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No. 83-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD BOULIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	Page
Table of Authorities	i
Argument	1
Conclusion	10

TABLE OF AUTHORITIES

Cases:

United States v. Ruisi, 460 F.2d 153	4, 6
Huddleston v. United States, 415 U.S. 814	2

Statutes:

18 U.S.C. 922	4
18 U.S.C. 922(a)	4, 5, 6, 7
18 U.S.C. 922(c)	1, 2, 4, 5, 6, 7, 8
18 U.S.C. 922(m)	8
18 U.S.C. 923	4, 6, 8
18 U.S.C. 923(g)	8
18 U.S.C. 924(a)	8
18 U.S.C. 1715	ii, 3

Regulations and Rulings:

27 C.F.R. 178.96	2, 7
27 C.F.R. 178.96(b)	2
27 C.F.R. 178.96(c)	2
27 C.F.R. 178.124(a)	6, 8
27 C.F.R. 178.124(c)	6, 7, 8
Your 1977 guide to—FIREARMS REGULATION	5, 6, 9, 10
Revenue Ruling 69-59	4

ADDITIONAL STATUTE INVOLVED

18 U.S.C. 1715. Firearms as nonmailable; regulations

Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe, for use in connection with their official duty, to officers of the Army, Navy, Air Force, Coast Guard, Marine Corps, or Organized Reserve Corps; to officers of the National Guard or Militia of a State, Territory, or District; to officers of the United States or of a State, Territory, or District whose official duty is to serve warrants of arrest or commitments; to employees of the Postal Service; to officers and employees of enforcement agencies of the United States; and to watchmen engaged in guarding the property of the United States, a State, Territory, or District. Such articles also may be conveyed in the mails to manufacturers of firearms or bona fide dealers therein in customary trade shipments, including such articles for repairs or replacement of parts from one to the other, under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, any pistol, revolver, or firearm declared nonmailable by this section, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

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1. Respondent disputes Petitioner's contention that he was improperly indicted under 18 U.S.C. 922(c) (Opp. 5), thereby reflecting a basic misunderstanding of section 922(c). Respondent's position that a licensed federal firearms dealer may make non-over-the-counter sales *away from* the premises specified in his license, provided he performs the reporting procedures in section 922(c), is clearly erroneous and refuted by Form 4473 and the accompanying instructions provided to licensed firearms dealers by the Bureau of Alcohol, Tobacco and Firearms (ATF) to enable compliance with 18 U.S.C. 922(c). (App. N, 65a) In Part II of Form 4473, a "Non-over-the-Counter Transaction" is defined on page 2, (App. N, 66a) as "A *mail order* transaction to the resident of the State in which the transferor's (seller's) premises are located." (emphasis added). In other words, the only "Non-over-the-Counter Transaction" permitted by 18 U.S.C. 922(c) is a mail order sale, which must be made by a licensed dealer from his business premises. There exists no form designed to be completed by a licensed dealer who transfers a firearm at any place *away*

from his business premises, since the Gun Control Act of 1968 does not permit a licensed dealer to make such a transfer.

27 C.F.R. 178.96 (Pet. xi), which implements 18 U.S.C. 922(c) by prescribing the procedures to be followed by a dealer when he makes a mail order sale, is clearly captioned *"Out-of-State and mail order sales."* Section 178.96(b) covers mail order sales, and section 178.96(c), not relevant here, prescribes the conditions under which a sale may be made by a licensed dealer at his business premises to a non-licensed resident of a contiguous state. It, nonetheless, appears that Respondent, by quoting from *Huddleston v. United States*, 415 U.S. 814 (1974) (Opp. 5-6), may be attempting to suggest that the Gun Control Act prohibits mail order sales (Opp. 5-6). On the contrary, as Part II of Form 4473 evidences, under certain circumstances, such sales may be made. Thus, ATF has created a special form and issued a specific regulation to ensure that such sales are recorded as such. What the Gun Control Act does prohibit, as has been thoroughly explained in the Petition (Pet. 11-16), is off-premises or itinerant dealing in firearms by a licensed federal firearms dealer.

It is, therefore, very much in dispute, contrary to the opening sentence of Respondent's argument, whether Petitioner, when he transferred five guns to Gordon Schoen away from his business premises, was guilty of a failure to submit forms or maintain records. There is no evidence to indicate that Schoen placed a mail order with Petitioner and that the latter shipped the firearm without completing Part II of Form 4473. The plain language of 18 U.S.C. 922(c) (Pet. vii) permitting a licensed dealer to sell to a person "who does not appear in person at the licensee's business premises" clearly refers to a person who mails his order, rather than coming in-person to the dealer's premises.

Respondent's erroneous contention that Petitioner could properly have conducted business as a firearms dealer at a gun show, provided Part II of Form 4473 (Opp. 6)

was completed, is contradicted in the next paragraph of its argument (Opp. 7). Respondent accomplishes this by stating that ATF has proposed altering its regulations to permit a licensed dealer to sell firearms at a gun show within the same state as the dealer's licensed premises. This rulemaking proceeding will not, however, contrary to Respondent's position, put to rest Petitioner's claim that a dealer selling at a gun show is unlicensed and, therefore, not properly charged if charged with failure to complete Form 4473. Rather, this rulemaking proceeding further confirms that a licensed federal firearms dealer is not now and was not in 1977 permitted to conduct his business at a gun show.[1]

It is, moreover, by no means certain that ATF will issue such regulations, especially since it previously advanced this idea, but did not follow through: Advance Notice of Proposed Rulemaking, No. 343, 45 Fed. Reg. 26982 (1980). In any case, it is also apparent that ATF does not have the authority to promulgate regulations to permit dealers to engage in business at gun shows. Notice of Proposed Rulemaking No. 487, 48 Fed. Reg. 44088 (1983), cited by Respondent (Opp. 7), states at 44089 that it "proposes regulations to allow licensees to sell firearms and ammunition at gun shows under the same license issued for their permanent address."[2] 18 U.S.C.

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[1] Respondent seems to suggest (Opp. 7, n.2) that Petitioner should have transferred the firearms to Schoen at his business premises. This is not correct, however, since the firearms were owned by Petiitoner in his personal capacity and were not part of his business inventory. If the guns had been part of his business inventory, it would have been necessary, when he transferred them at his business premises, to complete Part I of Form 4473 for an "Intra-State Over-the-Counter Transaction" (App. M, 63a). Petitioner also would not have been permitted, contrary to Respondent's suggestion, to mail the guns to Schoen under any condition, because of 18 U.S.C. 1715, *supra*, which prohibits the mailing of firearms capable of being concealed on the person. All the guns sold to Schoen were handguns capable of being concealed on the person.

[2] This Notice of Proposed Rulemaking was published on September 27, 1983. The Petition for Certiorari in this case was filed on September 13, 1988.

923, however, requires that a dealer have a separate license for each place at which he does business (Pet. ix). This has long been ATF's construction of section 923. Revenue Ruling 69-59 (Pet. xiv). This view was enunciated by the Second Circuit in *United States v. Ruisi*, 460 F.2d 153, 154, when it stated:

> Under the federal statute, an enterprise dealing in firearms must obtain a license for each location at which it sells guns. It cannot obtain a temporary license to sell firearms at a location other than at its *bona fide* business location. For example, a licensed dealer cannot obtain a license to deal in firearms at a trade show or gun show if that show is held at a location other than the site of the dealer's licensed business.

This language from the opinion of the Second Circuit also clearly demonstrates that that court carefully considered the propriety of the charges against the defendants and had not merely "assumed" their propriety as Respondent asserts (Opp. 7, n.3). It is also not surprising, contrary to Respondent's assertion, that the defendants in *Ruisi* did not challenge their convictions under 18 U.S.C. 922(a) (Pet. vii), for dealing in firearms without a license since, as the Court of Appeals pointed out, the record contained "overwhelming evidence" to support this finding (460 F.2d at 155). Indeed, had Petitioner in this case completed a Form 4473 for each of the sales to Schoen, as did the defendants in *Ruisi* for each of their sales, there would be overwhelming evidence that he had engaged in business without a license in violation of 18 U.S.C. 922(a).

2. The most astounding of Respondent's assertions is (Opp. 7, n.3) that there is no conflict over whether the Petitioner's conduct was illegal and that therefore it makes no difference under what subsection of 18 U.S.C. 922 he was convicted. Respondent insists that Petitioner's conviction of violating 18 U.S.C. 922(c) should not be reviewed, since he violated 18 U.S.C. 922(a), and that the difference between the two crimes is merely an error

in citation. First, there is most assuredly a conflict over whether Petitioner's conduct was illegal, since Petitioner contends he did not violate 18 U.S.C. 922(c), the statute upon which his conviction was based. Second, he cannot be guilty of violating 18 U.S.C. 922(a), since he has not been charged with, and convicted of, that offense. To characterize the difference between a charge of dealing in firearms without a license in violation of 18 U.S.C. 922(a), and a failure to complete Form 4473 for a mail order sale in violation of 18 U.S.C. 922(c), as merely an error in citation, is incomprehensible, as each subsection makes crimes of acts which are entirely distinct.

The Respondent is, moreover, incorrect in stating (Opp. 9) that had Petitioner not been a licensed dealer, Petitioner's course of conduct would have subjected him to prosecution for dealing in firearms without a license. A correct statement would be that since Petitioner was not licensed to deal in firearms at the gun shows, it would have been appropriate to conduct an investigation to determine whether Petitioner was making more than an occasional sale of a firearm and whether there was sufficient evidence to prosecute him for dealing in firearms without a license in violation of 18 U.S.C. 922(a).[3] The investigating agents, however, chose to investigate under an incorrect theory and to apply for a search warrant in the mistaken belief that Petitioner had violated 18 U.S.C. 922(c). The prosecutor then fell into the same error. It is understandable, although not excusable, that the investigating agents and the prosecutor did not realize that the language of 18 U.S.C. 922(c) referred to mail order sales. It is shocking, however, that this error should be so tenaciously defended in this court by Respondent. Plainly, a confession of error would be appropriate in this case, rather than an insistence that Petitioner's con-

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[3] As stated in *your 1977 guide to*—FIREARMS REGULATION (Pet. xiv), a nonlicensed resident of the state in which a gun show is being held may make an occasional sale of a firearm to another nonlicensee residing in his state, as long as he is not engaging in the business.

viction under 18 U.S.C. 922(c) should stand since he may have violated 18 U.S.C. 922(a), an entirely separate crime with which he has never been charged or of which he has never been convicted. Respondent's position indeed underscores the necessity stated in the Petition (Pet. 16), for this Court to give the Government and the Courts of Appeals guidance concerning the proper construction of the technical record-keeping provisions of the Gun Control Act of 1968.

Also, contrary to Respondent's assertion, *United States v. Ruisi*, *supra*, and this case are in direct and irreconcilable conflict as explained in the Petition (Pet. 12). It is, moreover, not surprising that the Respondent is not aware of any reported decision, subsequent to *Ruisi*, holding that a licensed dealer is unlicensed when he makes sales off his premises, since that point is manifestly clear from a reading of the Gun Control Act and accompanying regulations, as also explained in the Petition (Pet. 14)[4], and has, therefore, not needed to be the subject of judicial construction.

3. Respondent also resorts to a claim of error-in-citation in an attempt to reconcile inconsistent charges in the indictment under which Petitioner was convicted. Petitioner's convictions under Counts One through Four and also Count Seven are based on allegations that when he sold the five firearms to Schoen, he failed to comply with 18 U.S.C. 922(c), which compliance is accomplished by completing Part II of Form 4473, relating to mail order transactions (Pet. 5, n.3). On the other hand, his convictions under Counts Eight through Twelve, in connection with the same five sales, are based on allegations that he failed to comply with 18 U.S.C. 923 and 27 C.F.R. 178.124(a) and 178.124(c), which

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[4] *Your 1977 guide to*—FIREARMS REGULATION (Pet. xiii), which is made available to all licensed dealers, informs dealers that they may not complete sales at Gun Shows. Completion of the sale, of course, is accomplished by the transfer of the firearm over-the-counter at the dealer's premises, together with the execution of Form 4473, Part I, which must accompany each such transfer.

compliance is accomplished by completing Part I of Form 4473, relating to over-the-counter transactions (Pet. 6, n.4). Respondent now claims (Opp. 10-11) that the citation of 27 C.F.R. 178.124(c), which deals with over-the-counter transactions, in each of Counts Eight through Twelve, was a "miscitation." Respondent, however, should not be allowed to resort to the error-in-citation tactic in this instance anymore than in its attempt to confuse 18 U.S.C. 922(a) and 18 U.S.C. 922(c). Petitioner was entitled to, and did, rely upon this citation, and to assume that the prosecutor did not intend to charge two identical counts for each sale. Petitioner, moreover, has consistently taken the position that he was not required to complete Form 4473 for the sales of his personal firearms away from his business premises. The reasons for his position that the Gun Control Act clearly distinguishes personal firearms from business inventory has been thoroughly explained in the Petition (Pet. 16), together with the suggestion that the Government and the Courts of Appeals need the guidance of this Court concerning the technical record-keeping provisions of the Gun Control Act of 1968.

A review of the indictment as a whole, moreover, refutes any suggestion that the reference to 27 C.F.R. 178.124(c) was a "miscitation." Counts One through Four and Count Seven (App. I, 42a-45a) allege, in the charging paragraph, a failure to comply with the requirements of 18 U.S.C. 922(c), and cite 18 U.S.C. 922(c) and 924(a) beneath that paragraph. Clearly, this directs a defendant to 18 U.S.C. 922(c), its implementing regulation 27 C.F.R. 178.96, and its implementing Form, Part II of Form 4473. It is obvious that 18 U.S.C. 922(c) can be complied with only by executing Form 4473, Part II, which, in its text, contains the sworn statement language of section 922(c). (App. N, 65a) These counts also reflect that the prosecutor knew how to draft a charge under 18 U.S.C. 922(c).

Count Eight through Twelve (App. I, 45a-48a) on the other hand allege, in the charging paragraph, violations

based on failure to keep records pursuant to 18 U.S.C. 923 and 27 C.F.R. 178.124(a). 18 U.S.C. 923(g) (Pet. ix) requires that dealers "maintain . . . such records of . . . sale, or other disposition, of firearms . . . as the Secretary may by regulations prescribe." These five counts, unlike the first five, depend on 18 U.S.C. 922(m) and 923 (Pet. ix). 18 U.S.C. 922(m) makes it unlawful to fail to maintain records required pursuant to section 923 or regulations promulgated thereunder. The citation of 27 C.F.R. 178.124(c) was obviously placed under the charging paragraph to direct attention to the specific regulation and particular form (Form 4473, Part I) which the defendant allegedly failed to maintain since section 923, unlike section 922(c), does not spell out details for compliance in its text. The citation of 27 C.F.R. 178.124(c) was very appropriate, as were the other citations under these counts: 18 U.S.C. 922(m), 18 U.S.C. 923, 18 U.S.C. 924(a) and 27 C.F.R. 178.124(a). The citation of 27 C.F.R. 178.124(c) made it crystal clear that Counts Eight through Twelve referred to Part I of Form 4473. Obviously, in any event, these counts could not have been intended to charge the failure to prepare Part II of Form 4473, the only other part of the Form which exists, since Counts One through Four and Seven, drafted entirely differently, had already so charged. The inconsistency therefore remains and is not, as Respondent asserts "of no practical consequence," since Petitioner, who was not obliged to complete either of the two parts of Form 4473, remains a convicted felon.

4. Respondent also makes other statements which require correction.

First, Respondent describes Gordon Schoen, the person to whom Petitioner transferred the firearms in this case, as an "undercover agent" for ATF (Opp. 2). There is no evidence, however, that Schoen used other than his true name or that he had utilized any "cover" story in his dealings with Petitioner. Such an unwarranted description of Schoen, when coupled with Respondent's recitation of congressional concerns in enacting the Gun

Control Act (Opp. 5-6), incorrectly suggests that ATF was doing more than trolling at gun shows, attempting to "make cases" against hobbyists under the technical *mala prohibita* strictures of the Gun Control Act.

Second, Respondent has suggested, in stating that Petitioner "failed" to record the sale of a firearm in his "personal weapons log" (Opp. 2), that Petitioner committed an unlawful act. This is incorrect, since Petitioner was under no legal obligation to maintain a "personal weapons log".

Third, Respodent, in observing that none of the guns sold to Schoen on September 25, 1977 (Opp. 2) was recorded in his dealer's firearms record book, incorrectly suggests that Petitioner wrongfully failed to record the sales. The significance of the fact that the guns had not been entered in the dealer's record book is that they had never been acquired by Petitioner's business. He was, therefore, under no obligation to record these sales to Schoen as dispositions by the business. Significantly, Petitioner was not charged with failure to record in his dealer's record book, as acquisitions or dispositions, the guns sold to Schoen.

Fourth, Respondent attempts (Opp. 3) to impute to Petitioner an intent improperly to make unrecorded sales by referring to transcripts of two consensually recorded telephone conversations between Schoen and Petitioner, one in October 1977 and one on December 6, 1977, in which Petitioner allegedly agreed to make sales "off paper." There was, however, only one consensually recorded telephone conversation, the conversation of December 6, 1977. The ATF agent who prepared the affidavit in support of the search warrant has admitted that Schoen did not use the term "off paper" in his telephone conversation with Petitioner (App. P. 73a, Pet. 7 and n.5).

Fifth, contrary to Respondent's assertion (Opp. 13), Petitioner relied on the advice of an ATF inspector, not upon *your 1977 guide to*—FIREARMS REGULATION, in sell-

ing firearms owned in his personal capacity without preparing a Form 4473. The *guide*, however, confirms that the advice was correct (Pet. 22, n.16). Similarly, the Krogman letter (Pet. App. K, 56a) was not relied upon by Petitioner in making the sales, but corroborates the fact that Petitioner indeed received advice from the ATF inspector and that that advice was correct. Moreover, as previously explained (Pet. 9), former ATF Director Dickerson's letter purporting to disavow the Krogman letter did not actually do so because the material he submitted to corroborate his letter actually contradicted it (Pet. 9-10, App. L, 62a). The sample entry and instructions referred to in Mr. Dickerson's letter explain the transfer by a dealer of a personal firearm to a certified law enforcement officer. The dealer is instructed, and the sample entry illustrates, that he need not prepare Form 4473, but must enter the transaction in his dealer's record book.

CONCLUSION

For the reasons set forth herein and in the Petition, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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